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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

eBUSINESS APPLICATION
SOLUTIONS, INC., et al.,

Plaintiffs and Respondents,

v.

DINESH GUPTA et al.,

Defendants and Appellants.

H032678

(Santa Clara County

Super. Ct. No. CV095811)

Appellants Dinesh Gupta and Sunita Gupta separately appeal from a judgment confirming a contractual arbitration award against them.¹ Dinesh Gupta contends that he was denied due process when the panel of arbitrators refused to permit his lawyer to testify as to his state of mind relative to the issue of punitive damages. Sunita Gupta claims that the arbitrators' award of attorney fees and costs against her was improper, because none of the claims and defenses submitted for decision involved her.

Respondents eBusiness Application Solutions, Inc., Ravinder Saini, Gurinder Saini, Ajay Chopra and Jessica Chopra have filed a motion seeking sanctions against Sunita Gupta for taking a frivolous appeal solely for the purpose of causing delay.

¹ Appellants have each filed separate notices of appeal from the same judgment.

FACTUAL AND PROCEDURAL SUMMARY²

Ravinder Saini (Ravinder) and Jessica Chopra (Jessica) are brother and sister, born and raised in India.

Jessica and Ravinder came to the United States and started businesses in the technical staffing industry, in which the business recruits, trains and places software consultants in the fields of software quality assurance, business analysis, and configuration management. Technical staffing companies make substantial investments in recruiting and screening potential candidates, assisting them in relocating, training them, ensuring proper work status for those who are foreign nationals, and placing them as consultants. Ravinder started Accurate Software (Accurate) in 1997. Jessica started eBusiness Application Solutions, Inc. (eBAS) in 2000.

Dinesh Gupta (Dinesh) was a family friend of Ravinder and Jessica in India. He came to the United States in 1999 and began working for Ajay Chopra (Ajay), Jessica's husband. In 2000, he joined Jessica at eBAS. Dinesh became a trusted employee at eBAS, with access to highly confidential information about eBAS's clients, consultants, and economic dealings. eBAS stored all of its information in electronic form in password-protected computers. Dinesh had the highest level of access to all of eBAS's confidential and trade secret information.

On December 2, 2003, Dinesh signed a non-disclosure and non-solicitation agreement with eBAS, whereby he promised not to disclose any of eBAS's confidential information, not to solicit eBAS's clients after termination of his employment, and not to solicit eBAS's consultants during his employment and for one year thereafter.

² The facts stated are taken from the arbitrators' final award. As stated *infra*, an arbitrator's decision will not be reviewed for errors of fact or law. (*Aguilar v. Lerner* (2004) 32 Cal.4th 974, 981-982.) Therefore, we take the arbitrators' findings as correct. The record on appeal does not include a reporter's transcript of the arbitration hearing.

On February 3, 2005, shortly after receiving his green card, Dinesh resigned from eBAS. Shortly thereafter, eBAS discovered that while Dinesh was still employed, he had sent voluminous amounts of eBAS's documents and information to his personal e-mail account, including attorney-client communications between eBAS and its attorneys and spreadsheets with the names and contact information of eBAS clients. Dinesh spread rumors that eBAS was going to close and that everyone working there would be out of a job, which was particularly troubling to those eBAS consultants whose legal status in the United States was dependent upon their employment with eBAS.

Within a week of leaving eBAS, Dinesh and Ravinder started a competitive business known as Kuber Infotek, LLC (Kuber). Kuber's articles of incorporation identified Sunita Gupta (Dinesh's wife) and Gurinder Saini (Ravinder's wife) as members of Kuber. In April 2005, Sunita and Gurinder signed an operating agreement that named their husbands as the company's managers and gave each an equal 50 percent control over operations. The following month, the two couples (Sunita and Dinesh, Ravinder and Gurinder) entered into an agreement entitled "Kuber Infotech LLC Operating Protocols."

In July 2005, Dinesh and Ravinder formed Hightech Technologies, LLC for the purpose of training Kuber employees. They then signed an operating agreement for Hightech that was similar to Kuber's Operating Agreement.

In September 2005, eBAS filed suit against Dinesh and Ravinder for breach of fiduciary duty, unfair competition, trade secret theft and similar claims. Dinesh cross-complained for wrongful termination and unpaid commissions.

Differences arose between Dinesh and Ravinder over how Kuber should be operated and how the eBAS litigation should be pursued. Thereafter, Dinesh allegedly shut Ravinder out of the business. To Dinesh's consternation, Ravinder allegedly wrote checks on the Kuber account to reimburse Accurate.

More lawsuits followed. On November 15, 2005, Dinesh and Sunita sued eBAS, Jessica, Ajay, Ravinder and Gurinder. Two days later, Ravinder and Gurinder sued Kuber, Hightech, Dinesh and Sunita. In February, Sunita and Kuber sued Gurinder. Finally, in August 2006, Kuber filed a complaint against Accurate and Ravinder.

In July 2006, the parties agreed to submit all existing disputes to binding arbitration, to be conducted before a panel of three arbitrators. It was further agreed that the parties to the arbitration might include, depending upon the claims and cross-claims asserted, Dinesh, Sunita, Ravinder, Gurinder, Jessica, Ajay, eBAS, Accurate, Hightech, and Kuber.

The arbitration commenced on March 3, 2007. On March 13, 2007, the parties stipulated in writing to the claims and defenses to be decided. The list of submitted claims and defenses, which was quite detailed, focused on Dinesh's conduct and did not mention Sunita. It did not expressly include or exclude any claims asserted by or against her.

The arbitrators issued an interim award in May 2007. The interim award stated that eBAS was entitled to (1) \$1,967,717.00 in compensatory damages against Dinesh, (2) punitive damages against Dinesh in his individual capacity, and (3) attorney fees and costs. Ravinder and Gurinder were found to be entitled to (1) nominal damages of \$1.00 against Dinesh, (2) a one-half interest in Kuber, valued at \$150,000.00, and (3) attorney fees and costs, as prevailing parties in their claims and defenses against Dinesh and Sunita. Dinesh and Kuber were awarded nominal damages of \$1.00 against Ravinder. The interim award specified that the amounts of punitive damages, attorney fees and costs were to be determined in subsequent proceedings.

In July 2007, the following post-decision motions were heard and taken under consideration by the arbitration panel: (1) the motion of dinesh, Sunita and Kuber (collectively, "the Gupta parties") for Reconsideration of the Interim Award; (2) the motion of eBAS, Ravinder, Gurinder, Jessica, and Ajay (collectively, "the eBAS parties")

for punitive damages; (3) the eBAS parties' motion for attorneys fees and costs; and (4) the Gupta parties' motion for attorneys fees and costs.

The Gupta parties' Motion for Reconsideration was based in part on Dinesh's argument that he was denied due process because his attorney, Kevin Bedolla, was not permitted to testify on his behalf during the arbitration. The subject of Mr. Bedolla's anticipated testimony was Dinesh's state of mind as it pertained to the issue of punitive damages. The Gupta parties proffered a written declaration from Mr. Bedolla, listing 14 areas on which he would have testified at the arbitration, had he been permitted. The panel noted that the issue had been raised, argued and decided at the arbitration, where the Gupta parties' identical offer of proof as to Mr. Bedolla's testimony was rejected. The panel found that Respondents had not been prejudiced by the exclusion of Mr. Bedolla's testimony at arbitration because all of the facts he was prepared to testify on had already been presented to the panel through other documents and witnesses. Moreover, Dinesh had been given an opportunity to testify about the same facts himself, but had chosen not to. Therefore, the panel concluded that Mr. Bedolla's testimony was properly excluded under Evidence Code section 352 on the grounds that it was redundant, time-consuming, and potentially prejudicial to his own client in the event he was cross-examined by opposing counsel.

On September 25, 2007, the panel issued a final award denying the motion for reconsideration and confirming the interim award. The amounts of punitive damages and attorneys fees were fixed as follows. eBAS was awarded \$200,000.00 in punitive damages against Dinesh Gupta. As a prevailing party, eBAS was also awarded \$835,586.00 in attorney fees against Dinesh, Sunita, and Kuber. Ravinder and Gurinder were awarded a nominal sum of \$1.00 for Dinesh's breach of fiduciary duty. As prevailing parties on their claims and defenses against Dinesh and Sunita, Ravinder and Gurinder were awarded attorney fees in the sum of \$596,781.50. Lastly, eBAS, Ravinder

and Surinder were awarded costs in the amount of \$221,716.16 against Dinesh, Sunita and Kuber.

The eBAS parties then petitioned the trial court to confirm the arbitration award. The Gupta parties opposed the petition and sought instead to vacate the award, again arguing that they had been substantially prejudiced at the arbitration hearing by the panel's refusal to permit the testimony of Mr. Bedolla. At the hearing on the petition to confirm the award, counsel for the Gupta parties raised a new argument that the award of fees and costs against Sunita should be corrected because there were no claims by or against her on the list of issues submitted to the arbitrators for decision. Opposing counsel objected to this new argument, stating that he had not been given an adequate opportunity to respond because Sunita's claim had not been raised in her written response. The trial court granted the petition without comment on Sunita's request for correction and issued a judgment confirming contractual arbitration award on December 12, 2007.

Dinesh and Sunita each separately appeal from the Judgment confirming the Final Award.

DISCUSSION

Dinesh contends that the panel erred when it decided to exclude his attorney's testimony. Sunita contests the award of fees and costs against her, arguing that the arbitrators had no authority to make that award because her claims and defenses were not included on the list of issues submitted for decision.

With few exceptions, California courts adhere to a general rule of arbitral finality. "California favors arbitration as a speedy means of settling disputes, and to facilitate the policy it is essential that arbitration judgments are binding and final. (*A.M. Classic Construction, Inc. v. Tri-Build Development Co.* (1999) 70 Cal.App.4th 1470, 1474-1475) Accordingly, arbitration judgments are subject to extremely narrow judicial review and the exclusive grounds for vacating an arbitration award are the statutory

grounds set forth in [Code of Civil Procedure] section 1286.2 (*Marsch v. Williams* (1994) 23 Cal.App.4th 238, 243-244 . . . , citing *Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1 . . .), such as the ‘award was procured by corruption, fraud or other undue means,’ or the arbitrator exceeded his or her powers ([Code Civ. Proc.,] § 1286.2, subd. (a)(1), (4)). ‘Unless one of the enumerated grounds exists, a court may not vacate an award even if it contains a legal or factual error on its face which results in substantial injustice.’ (*Marsch v. Williams, supra*, [23 Cal.App.4th at pp. 243-244.]” (*Luce, Forward, Hamilton & Scripps, LLP v. Paul Koch* (2008) 162 Cal.App.4th 720, 728.)

I. Exclusion of Attorney Bedolla’s Testimony

Dinesh contends that he is entitled to have the judgment reversed and the punitive damages award against him vacated pursuant to Code of Civil Procedure section 1286.2, subdivision (a)(5), which provides that an arbitration award may be vacated when “[t]he rights of the party were substantially prejudiced by . . . the refusal of the arbitrators to hear evidence material to the controversy” He argues that he was prejudiced by the exclusion of Mr. Bedolla’s testimony, which was material to the issue of punitive damages because it would have shown that he relied solely on the advice of counsel and thus did not have the requisite state of mind to support a finding of malice.

Where a party seeks to vacate an arbitration award on this basis, “the reviewing court should generally focus first on prejudice, not materiality. To find substantial prejudice the court must accept, for purposes of analysis, the arbitrator’s legal theory and conclude that the arbitrator might well have made a different award had the evidence been allowed.” (*Hall v. Superior Court* (1993) 18 Cal.App.4th 427, 439.)

Dinesh has not shown substantial prejudice. The arbitrators’ legal theory with respect to the award of punitive damages against him was that he had misappropriated eBAS’s trade secrets with a clear design to set himself up as a competitor, and that in doing so he had acted with malice, as defined in Civil Code section 3294. Dinesh was given an opportunity at the arbitration hearing to present evidence of his state of mind by

making a detailed offer of proof as to his attorney's intended testimony, which he did. Thus, the panel did fairly consider the evidence before deciding to exclude it on the ground that it was redundant, time-consuming and prejudicial under Evidence Code section 352. Moreover, Dinesh was given an opportunity to present much the same evidence through his own testimony, but he declined. On this record, there is no basis to conclude that the award would have been different had Dinesh been permitted to replace his informal offer with actual testimony from Mr. Bedolla. Accordingly, judicial review of the panel's decision to exclude Mr. Bedolla's testimony is not warranted.

II. Award of Attorneys Fees and Costs Against Sunita

Sunita contends on appeal that the arbitrators exceeded their powers in awarding attorney fees and costs against her because the arbitrators were never asked to decide any claims or defenses with respect to her as an individual. She seeks reversal of that part of the judgment confirming the arbitration award against her. The eBAS parties respond that Sunita has waived this argument by failing to raise it at any time prior to oral argument on their petition to confirm the final award. In any event, according to the eBAS parties, the arbitrators did not exceed their powers in awarding fees and costs against Sunita because she was both a named party in the underlying lawsuits and an active participant in the arbitration proceedings.

Under Code of Civil Procedure section 1286.2, subdivision (a)(4), a court shall vacate an arbitration award if it determines that "[t]he arbitrators exceeded their powers and the award cannot be corrected without affecting the merits of the decision upon the controversy submitted."

With respect to the issue of waiver, the eBAS parties assert that Sunita has "doubly waived" her claim because she failed to raise it twice: during post-arbitration proceedings, and again in her written response to their petition to confirm the final award as a judgment.

It is clear from the final award itself, which addressed the post-arbitration motions of the Gupta parties in great detail, that Sunita did not make any argument concerning the scope of the arbitrators' authority or the award against her at that time. Likewise, her written response to the petition to confirm the final award, which included a specific request to vacate it on two separate grounds, did not mention the present claim. It was not until oral argument at the hearing on the petition to confirm the award that her attorney first raised the issue. Petitioners' counsel objected and responded to the merits by stating: "The alleged error in awarding attorneys' fees against Sunita Gupta were not raised in response to the petition that was filed so we did not have an opportunity to respond in writing to you. I can assure you that the reason attorneys' fees were awarded against Sunita Gupta was because she brought a claim under the Kuber, LLC agreement to determine that the Sainis did not have an ownership interest in Kuber, LLC. That claim was determined adversely against her, as is obvious. And because there was a prevailing party provision in the LLC agreement, that is why attorneys' fees were properly assessed against her for bringing that non-meritorious claim on which she lost. I understand . . . that's not in the papers before you, but then this claim was just made before you right now." Petitioner's counsel did not request a continuance. The trial court confirmed the final award without directly addressing the appropriateness of the fees and costs assessed against Sunita or her failure to raise the issue earlier.

Sunita's claim that the arbitrators exceeded their authority is one of the statutory grounds for vacatur of the award under Code of Civil Procedure section 1286.2, subdivision (a)(4) [arbitrators exceeded their powers and the award cannot be corrected without affecting the merits of the decision upon the controversy submitted]. Alternatively, a party may seek correction of the award on the same ground, if that can be done without affecting the merits of the decision. (Code Civ. Proc., § 1286.6, subd. (b).)

Sunita waived her claim by failing to raise it before the panel during post-arbitration hearings. Determinations of arbitrability, that is, whether an arbitrator

exceeded his or her authority by deciding a particular issue, are properly determined in the first instance by the arbitrators, not a court of law. (*Advanced Micro Devices, Inc. v. Intel Corporation* (1994) 9 Cal.4th 362, 372 [doubts as to meaning or extent of arbitration agreement and determination of what issues are necessary to ultimate decision was for arbitrators and not court to resolve].) Giving substantial deference to the arbitrators' own assessments of their contractual authority is consistent with the general rule of arbitral finality. (*Id.* at p. 373.) The parties here expressly stipulated to the arbitration of all disputes between them, as delimited by their more specific list of claims and defenses to be decided by the arbitrators. The panel was in the best position to determine whether the parties meant by their submissions to exclude Sunita from all liability. Her failure to raise the issue during post-arbitration proceedings deprived the panel of that opportunity and resulted in a waiver of her claim. (See, e.g., *Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1, 9-10 [failure to raise claim regarding legality of fee-splitting provision waived the claim for future judicial review; question was for arbitrator in the first instance].)

In addition, Sunita's failure to include the claim in her written response did not comply with the procedural requirements for correcting arbitration awards and left the opposing parties without a meaningful opportunity to respond. A petition to correct or vacate an award, or a response requesting such relief, must set forth the grounds on which the request of such relief is based. (Code Civ. Proc., § 1285.8.)

Given the strong public policy favoring arbitration, and the extremely narrow statutory grounds for review, Sunita's failure to raise the issue during post-arbitration proceedings and her belated verbal request to correct the award on the ground that the arbitrators exceeded their authority was insufficient to preserve her claim for appellate review.

Even if she had not waived her claim, there is no basis on this record to reverse the judgment awarding fees and costs against Sunita. "An appellate court reviews a determination of whether an arbitrator has exceeded his or her powers de novo, but

displays substantial deference towards the arbitrator's determination of his or her contractual authority. [Citations.] All reasonable inferences must be drawn in support of the award. [Citation.]" (*Jones v. Humanscale Corporation* (2005) 130 Cal.App.4th 401, 408; accord, *Roehl v. Ritchie* (2007) 147 Cal.App.4th 338, 347.) "Absent an express and unambiguous limitation in the contract or the submission to arbitration, an arbitrator has the authority to find the facts, interpret the contract, and award any relief rationally related to his or her factual findings and contractual interpretation. [Citations.]" (*Gueyffier v. Ann Summers, Ltd.* (2008) 43 Cal.4th 1179, 1182.)

Sunita was an owner of Kuber ~ (CT 24)~ and a plaintiff in two of the underlying lawsuits: *Sunita Gupta v. Gurinder Saini* (Alameda Co. Superior Court Case No. RG06257283) and *Dinesh Gupta, et al. v. eBusiness Application Solutions, Inc., et al.* (Alameda Co. Superior Court Case No. RGO5242211).³ The latter lawsuit was an action on the Kuber operating agreement and sought attorney fees according to one of its provisions. The parties agreed to submit all of their existing disputes to binding arbitration, including the question of whether Ravinder and Gurinder had acquired an ownership interest in Kuber. The list of claims and defenses ultimately submitted for decision did not mention Sunita's individual claims and defenses specifically, but neither did it exclude them. We note that the disputes between Kuber and Accurate were expressly bifurcated for later decision, which indicates the parties were fully capable of excluding from the panel's purview those issues they did not wish to have decided. Sunita appeared through counsel as a party to the arbitration and was personally present at the post-arbitration motion for reconsideration, which was the only proceeding that was fully reported. Thus it does not appear that the parties intended to absolve her of all

³ Respondents' request for judicial notice of the complaints in these actions is granted pursuant to Evidence Code section 452, subdivision (d). (*Lockley v. Law Office of Cantrell, Green, Pekich, Cruz & McCort* (2001) 91 Cal.App.4th 875, 881.)

liability by omitting her name from the list of claims and defenses submitted for decision. The arbitrators based their award of fees and costs against Sunita on their finding that Ravinder and Gurinder had prevailed “on their claims against the Guptas [Dinesh and Sunita], and on the defenses of any claims brought against them by the Guptas and are entitled to an award of reasonable attorneys[] fees and costs” We therefore conclude that the arbitrators had the authority to determine the issue of liability for attorney fees and to include Sunita in that determination.

III. Motion for Sanctions

Respondents have filed motion for sanctions, contending that Sunita’s appeal was frivolous and dilatory.

“Code of Civil Procedure section 907 provides that ‘When it appears to the reviewing court that the appeal was frivolous or taken solely for delay, it may add to the costs on appeal such damages as may be just.’ Rule 26(a) of the California Rules of Court similarly provides that ‘[I]f an appeal is frivolous or taken solely for the purpose of delay . . . the reviewing court may impose upon offending attorneys or parties such penalties, including the withholding or imposing of costs, as the circumstances of the case and the discouragement of like conduct in the future may require.’ ” An appeal is frivolous “only when it is prosecuted for an improper motive—to harass the respondent or delay the effect of an adverse judgment—or . . . when any reasonable attorney would agree that the appeal is totally and completely without merit.” (*Pierotti v. Torian* (2000) 81 Cal.App.4th 17, 31, citing *In re Marriage of Flaherty* (1982) 31 Cal.3d 637, 650.) “An appeal that is simply without merit is *not* by definition frivolous and should not incur sanctions.” (*In re Marriage of Flaherty, supra*, 31 Cal.3d at p. 650.)

Although we have found Sunita’s appeal to be without merit, we do not consider it frivolous. There is no evidence that it was brought in bad faith. Given the amount of the award against her and the relative lack of clarity caused by the omission of her name from the list of issues to be decided by the arbitrators, it cannot be said that any

reasonable attorney would agree that this appeal should not have been pursued. Respondents have not shown that it was taken solely for purposes of delay because the identical argument was raised (albeit belatedly) in the trial court at the hearing on the petition to confirm the arbitration award. Therefore, the motion for sanctions is denied.

DISPOSITION

For the reasons stated above, the judgment is affirmed. The motion of the eBAS parties for sanctions against Sunita is denied. Each party is to bear their own costs of appeal.

RUSHING, P.J.

WE CONCUR:

PREMO, J.

ELIA, J.